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Nos. 95-1425; 95-1460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LUCIOUS ABRAMS, JR., *et al.*, and
THE UNITED STATES OF AMERICA,
Appellants-Intervenors,

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Southern District of Georgia

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

I. Whether the district court's fact findings, upon which the challenged districting plan is based, are reviewed under the clearly erroneous standard?

II. Whether the district court's plan comports with Georgia's traditional districting principles and this Court's holding in *Upham v. Seamon*, 456 U.S. 37 (1982)?

III. Whether the district court's plan complies with Section 2 of the Voting Rights Act?

IV. Whether the district court's plan is retrogressive?

V. Whether the district court's plan complies with the one person one vote standard?

VI. Whether the evidentiary hearing on remedy afforded Appellants fair opportunity to articulate what legal obligations they believe the Voting Rights Act imposes on a remedial districting plan?

VII. Whether the Abrams Appellants have abandoned their appeal from the district court's Order limiting their intervention in the Second District litigation?

PARTIES TO THE PROCEEDINGS

The movants, Plaintiffs below and Appellees in both case nos. 95-1425 and 95-1460 are Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, George Seaton, James Rhodes, Gary Heard, Daniel Morrell and Donald Shirah. The movants on behalf of the State of Georgia, Defendants below and Appellees in this Court, are Governor Zell Miller, Lt. Governor Pierre Howard and Secretary of State Lewis Massey in both cases no. 95-1425 and 95-1460. Appellants in case no. 95-1425 are Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr. and Karen Watson. In case no. 95-1460, the Appellant and Defendant-Intervenor below is the United States of America.

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MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees move this Court to affirm the Orders and Judgement of the district court which provided Georgia a constitutional congressional redistricting plan that remedied the racial gerrymandering found to exist in the preexisting plan.[1]

INTRODUCTION

At the root of both appeals[2] is Appellants' wish that Georgia have two majority minority congressional districts. But, neither Appellant disputes the fact that two of the three such districts created in 1992 by DOJ fiat are unconstitutional due to racial gerrymandering. The unconstitutional districts cannot remain majority minority without race being the predominant factor governing their design.

The Court should summarily affirm the judgment below and reject Appellants' efforts to compel the district court to create a second majority minority district where it correctly found one was not required by the Voting Rights Act [hereinafter VRA]. The district court properly characterized its role as that of a "caretaker" charged with fashioning a remedial plan [hereinafter the Plan][3] that cured the constitutional defects by employ-

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[1] *Johnson v. Miller*, 684 F.Supp. 1329 (S.D. Ga. 1994), *aff'd*, —— U.S. ——, 115 S.Ct. 2574 (1995) (Eleventh District held unconstitutional). Following remand, the court found the Second Congressional District unconstitutional, a finding the Appellant United States [hereinafter DOJ] conceded to be correct. No appeal was filed. U.S. Jurisdictional Statement App. 31a *et seq.*

[2] The Abrams Intervenors [hereinafter ACLU] appeal is No. 95-1425. The DOJ, another intervenor below, has filed its own appeal, No. 95-1460.

[3] Integral to a full and fair remedy is maximizing the time between implementation of the Plan and qualification of candidates beginning on April 22, 1996. The court's repair of the wholesale racial gerrymandering that permeated the 1992 plan will not instantly remedy all of the adverse side effects this kind of discrimi-

ing traditional districting principles that steered clear of the larger political questions. ACLU Jurisdictional Statement [hereinafter J.S.], App. 29. That is the correct approach.

Contrary to Appellants' claim that the Plan does not correctly reflect state legislative policy, Georgia did not appeal. Instead, it successfully opposed the ACLU's motion to stay implementation of the Plan. The State believes the Plan comports with traditional districting principles, accurately reflects legislative policy, and should not be disturbed on appeal.

For the DOJ to ask this Court to summarily halt the 1996 congressional election cycle with qualifying ten days away, and have yet another DOJ drawn plan imposed on Georgia, is irresponsible, particularly in light of the fact the DOJ never filed a motion for stay in December of 1995 when the Plan was implemented.

STATEMENT OF THE CASE

The Georgia General Assembly was called into Special Session to fashion a remedy following this Court's decision in *Miller v. Johnson*, —— U.S. ——, 115 S.Ct. 2475 (1995). It could not agree on a plan which maintained either the Eleventh or Second District as a majority district, because it would require the State to engage in racial gerrymandering. The legislature adjourned without enacting a remedial plan, forcing the district court to draw the Plan.

If one reads Appellants' Jurisdictional Statements without looking at the Plan, one would expect the Plan to be markedly different than the 1992 Plan. In truth, there is minimum change to the majority of the districts. Dis-

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nation causes a democracy. However, the Plan has been in place since December 13, 1995. This has afforded Georgians four months to begin the process of getting the new boundaries publicized, voters sensitized, candidates mobilized and the power of incumbency, where wrongfully gained, deemphasized. All that takes time, and the remedial Plan is now at work doing just that.

tricts 5, 6, 7 and 9 have little or no change. All parties agreed on the reconfiguration of District 1. The 8th District is not significantly changed. The Second District is returned to its 1982 core. The Fourth District is now sited in a reunified DeKalb County and the Tenth District mirrors its 1982 form. The Eleventh District is new, as it should be since it was added after the 1990 census. It tracks the growth counties north of Atlanta along I-85. It is the only district in the Plan Appellants seriously challenge.

1. The Unconstitutional Districts

Appellants want one thing: two majority minority districts. Yet, the district court's findings of fact preclude their request:

> "Ample evidence has been presented during the two trials to enable the court to determine that Section 2 does not require creation of a second majority minority district in Georgia—due primarily to the geographic dispersion of its minority population and lack of any significant vote polarization. Creating a second majority minority district would also violate the Supreme Court mandate under which we now operate because *Johnson II* held that the VRA cannot be applied to reach an unconstitutional result." (ACLU J.S., App. 20-21)

District Eleven was the new district in 1988 with no traditional economic base or geographic core to govern its placement. It did not suffer from a few easily reversible incidents of gerrymandering. Every aspect of the district was race driven.[4]

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[4] When Lt. Governor Howard was asked what part of the Eleventh District was racially gerrymandered, he was forthright in his reply: "Well, basically the whole district." *Miller v. Johnson*, (Tr. IV, p. 208). Howard went on to detail a racial reason for inclusion of virtually every county in the district. The district's counties were selected "for the purpose of achieving a certain . . . racial composition of the district. I think that's obvious. I don't think anybody disagrees with that. . . . We're trying to achieve a certain VAP in a certain population. Why else would you draw lines like that?" *Id.*

This Court held there was no cognizable community of interest to justify the district:

> "Nor can the State's districting legislation be rescued by mere recitation of purported communities of interest. The evidence was compelling that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." 864 F.Supp. at 1389-90, 115 S.Ct. at 2490.

The starting point on remedy was rejection of the old serpentine Eleventh as the framework. The district court began by identifying the district's core in DeKalb County,[5] and in reuniting that county because the population of DeKalb is roughly equal to a congressional district. This approach advanced a number of traditional districting principles. It reunited DeKalb County (except for that small portion that is also part of the City of Atlanta which was kept intact in the Fifth District). It created an extremely compact district involving just two metro counties. It was also a means of insuring this district was a strong minority influence district,[6] destined to become Georgia's second majority minority district by the year 2000.

Consolidating the district in DeKalb was also dictated by the fact the metro area was where the State's minority population increased between 1980-1990. It was therefore logical and nondiscriminatory to incorporate that core into a district sited in metro Atlanta. Crafting the remedy in this fashion gave the district the synergy of an urban/suburban economic orientation, located it in the number

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[5] South DeKalb made up 35.3% of the District's total population. (*Pl. Exh.* 24). When the appendages in Chatham, Richmond, Wilkes and Twiggs County are removed, DeKalb represented over 60% of the remaining population.

[6] The district court found a ". . . demographic trend indicating DeKalb County's population, which comprises the majority of the remedy's Fourth District, has the potential to become a very strong minority influence district or a majority minority district as Georgia is reapportioned following future censuses, if it is not already." ACLU J.S. App. 24, n.17. DeKalb's black registered voters totalled 39.4% in 1995. *Id.*

one minority growth area in the State, while minimizing intrusion into the traditional cores of the other ten (10) districts. The new Fourth is the remedial district for the old Eleventh in the court's plan.

The district court's proper respect for the 1982 cores of the original ten districts dictated that the Tenth District be returned to its traditional east central Georgia location. Once that was done, the new Eleventh District formed quite naturally into an extremely compact north central district with a metro Atlanta foundation. This presented the least disruptive approach to incorporating a new district into Georgia's Congressional Plan.

District Two was the most intensely gerrymandered district in the 1992 plan.[7] The DOJ forced the State to pull over 200,000 predominately black urban voters from twelve different counties divided on purely racial lines and include them in the district, negating its rural and agricultural focus. Many were included via the "Macon-Savannah trade",[8] which effectively split the core of the Eighth District (Macon/Bibb County), into racial enclaves. Bibb's black citizens were relocated to the Second District for purely racial reasons. Any remedy of the unconstitutional racial gerrymander of Bibb County required it be returned to the Eighth District.

Muscogee County was also gerrymandered.[9] The remedial plan properly reunites Muscogee County and returns it to its traditional home, the Third District.

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[7] *See* Pl. Trial Exh. 29-40 and Pl. Exh. 1-23 submitted with Plaintiffs' Motion for Summary Judgment.

[8] *Miller v. Johnson*, 115 S.Ct. at 2484.

[9] No party disputed the fact that the divided rural counties and cities along the boundaries of the Second District had to be made whole. Even with these changes, the Second District in the remedial plan still remains a strong minority influence district with a black population of 39.21%. The DOJ's proposed district is 42% black but racially gerrymanders Muscogee County in the same manner that the district court found to be unconstitutional.

2. Appellants' Alternative Plans

The Appellants' approach to remedy is premised on two fundamentally flawed assumptions: (1) that the 1992 plan reflected the true will of the Georgia legislature; and (2) that unconstitutional districts are entitled to deference. If the 1992 plan is accorded such deference, then Appellants' objective of having racial enclaves instead of districts will permeate any remedial plan.

The ACLU plans retain the Macon portion of the unconstitutional "Macon-Savannah" trade. Apparently, the ACLU considers only the Savannah side of the trade unconstitutional. When faced with correcting the gerrymander of Muscogee County, the ACLU simply ignored the problem; a gerrymandered Muscogee and Bibb County are essential to the ACLU's race driven goal of maintaining the Second District's black population.[10]

The ACLU's "new" Eleventh is a noncompact race driven assemblage because there is no compact minority population present. Like the old Eleventh, the ACLU's plan is founded on the racial gerrymander of DeKalb County. In fact, the DeKalb portion in one ACLU version of the Eleventh (Plan "C") captured *83% (212.650) of DeKalb's entire black population (230,425)* via gerrymandering. This statistic should put an abrupt end to any further consideration of such a race driven alternative.

A visual comparison of the ACLU version of the Eleventh and the existing unconstitutional Eleventh underscores the point. The ACLU incorporates almost the full length of the former Eleventh and is relatively the same size, if not slightly larger in square miles. The ACLU's modus operandi is transparent. The original land bridge through Henry County is relocated to Rockdale and Newton counties. While both are predominantly white counties, they are lightly populated and form a "whole county" land bridge to get to Jasper County, the gateway to the

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[10] Using 1994 population figures, the Plan maintained the Second District as a *third* majority minority district.

sparsely populated rural east central counties whose black population makes them so desirable to Max-Black proponents.

Compactness is a defining traditional districting principle because it best interacts with the objectives of preserving the geographic cores and the economic orientations of existing districts to create functional districts. Yet, Appellants' versions of the Eleventh take it from south DeKalb all the way to South Carolina when a single metro county (DeKalb) provides almost enough population to locate the district in a single county. The VRA does not require Georgia to travel 200 miles via a land bridge composed of Rockdale and Newton counties for the sole purpose of tying *sixteen* distant rural counties,[11] whose total population is only 176,358 (with 95,010 being black), to a gerrymandered south DeKalb County. Appellants offer one rationale: "minimal disruption" of an unconstitutional district. It is a nonsequitur. If compactness is to have any meaning, this kind of race-based districting must be rejected.

(a) *Incumbents*: With the core of the old Eleventh now in the Fourth District, the Eleventh District incumbent, Cynthia McKinney, has already announced her intent to seek reelection in the Fourth since her home county is DeKalb. Rep. McKinney has publicly referred to her reconfigured district as a "rainbow" of diversity.[12] As noted

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[11] The counties, with the total population and black population percentage are Morgan (12,883; 34.6%), Jasper (8,453; 34.8%), Greene (11,793; 50%), Putnam (14,137; 33.6%), Taliaferro (1,915; 61%), Hancock (8,908; 79.4%), Baldwin (39,530; 42.3%), Wilkinson (10,228; 42.1%), Warren (6,078; 60.2%), Glascock (2,357; 12.6%), Washington (19,112; 51.7%), Johnson (8,329; 34.1%), Jefferson (17,408; 55.7%), Burke (20,579; 52.3%), Jenkins (8,247; 41.4%, and Screven (13,842; 45%).

[12] Ms. McKinney stated she was confident of reelection in a district dominated by her South DeKalb home: "There will be a new opportunity to form a real rainbow coalition because DeKalb County is a rainbow." McKinney Say's She'll Run, *The Atlanta Journal Constitutional*, December 17, 1995, Section G, page 1.

by the district court, DeKalb has a black population, using 1995 voting registration figures, of almost 40% [13] and a rapidly growing non-black minority population as well. White voters are a minority in DeKalb County.

The incumbent in the Fourth District, John Linder, is running for reelection in the renumbered Eleventh, which contains the core of his former Fourth District.[14] The Second District incumbent, Sanford Bishop, is also seeking reelection in his district. To date, no incumbents are running against each other.

(b) *Lack of a Compact Minority Population*: The district court's decision not to fashion a second majority minority district is based on the absence of a sufficiently numerous and compact minority population to support it. As the district court held:

> "Analysis of a racial map of Georgia reveals that the state's minority population is widely dispersed. In fashioning a remedy, we considered the possibility of creating a second majority minority district and concluded that to do so would require us to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense. Such a plan would directly contravene the Supreme Court's holding in *Johnson* II—that race cannot predominate in the redistricting context absent a compelling justification for it . . . . Nonracial factors do not support creation of a second majority minority district largely because Georgia's minority population is not geographically compact. *DeGrandy*, 114 S.Ct. at 2655. Creating a second majority minority district would require this Court to engage in the unconstitutional racial gerrymandering characteristic of the plan we now replace." ACLU J.S., pp. 21-22.

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[13] Appellants' contention that the minority voting age population in the Eleventh District was reduced "from 60.4% to 10.8%" is grossly misleading since it is the Fourth District in the remedial plan that is its counterpart, not the "new" Eleventh.

[14] *See* footnote 12 *supra*.

ARGUMENT

I. THE CLEARLY ERRONEOUS RULE IS THE GOVERNING STANDARD OF REVIEW

The issues upon which the district court's judgment on remedy turned are fact intensive. They involved an in-depth analysis of Georgia's geography, population demographics, districting history and the traditional principles and policies used to fashion federal voting districts. Paramount among the traditional districting principles adhered to was respect for existing political subdivisions, including counties, municipalities and voting precincts. Given the deference due those factual findings, summary affirmance under *Fed. R. Civ P.* 52(a) is warranted without further briefing or argument.[15]

This longstanding rule includes ultimate findings of fact in Voting Rights Act cases. *See Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The *Gingles* Court concluded:

> "Thus, the application of the clearly erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law."

The standard is especially applicable in these types of cases because of the importance of local factors and geography in assessing whether a gerrymander has infected a districting plan. District courts possess the critical local knowledge and experience to best make the crucial factual determinations on which these cases turn.

This same reasoning must apply to the presence of a racial gerrymander because the rationale for the deference

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[15] A finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 524, 92 L.Ed.2d 746 (1948)).

—the importance of local factors—is equally applicable in both types of cases. As the Court stated in *White v. Regester*, 412 U.S. 755, 769-770, 93 S.Ct. 2332, 2341 (1973):

> "[W]e are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise."

II. THE QUANTUM OF CHANGE EFFECTED BY THE COURT PLAN WAS NECESSARY GIVEN THE MAGNITUDE OF THE CONSTITUTIONAL INFIRMITY TO BE REMEDIED

The district court was faced with a daunting challenge on the question of remedy. Two large congressional districts involving almost one third of Georgia's 159 counties were found unconstitutional. It was not a question of malapportionment, but of racial discrimination, effectuated by bizarre geographical machinations that divided sundry cities and counties along express racial lines having no corresponding geographical counterpart. Moreover, the 1992 congressional plan was acknowledged to be more a creature of policy choices made by the DOJ than an exercise of legislative will by the General Assembly. *See* DOJ J.S. App. pp. 5-7. Thus, the district court was denied the most reliable compass used by judges in devising remedial plans.

The following criteria properly governed the district court's preparation of the remedial plan:

A. The Voting Rights Act: Any purposeful use of race as a predominant districting factor must find justification in the VRA or run afoul of the Fourteenth Amendment:

> "Any independent state interest in the remedial revision of voting laws is subsumed within [the VRA] . . . the VRA places a necessary leash on race-based remedial practices in the voting sphere. . . . The VRA ensures that states honor the right to vote; our recog-

nition of no other compelling justification for race based [districting] ensures that states do not go too far." *Johnson v. Miller*, 864 F.Supp. at 1380, *affirmed*, 115 S.Ct. 2475 (1995).

(1) *Section* 5: Appellants contend the remedial Plan is retrogressive. Leaving aside the fact a court drawn plan is not subject to Section 5, that contention is untrue. It is well settled that the last legislatively adopted *constitutional* congressional plan is the benchmark for retrogression. The DOJ's own regulations require a retrogression analysis to proceed from the most recent *constitutional* plan in force in the jurisdiction. *See* 28 C.F.R. § 51.54 (b).[16] *See also, Holder v. Hall*, —— U.S. ——, 114 S.Ct. 2581, 2586-88 (1994). In this case, that is the 1982 plan. The State agreed the 1982 plan is the proper benchmark. (Remedy Tr., pp. 378-380); Joint Stip. No. 88. A plan with one majority minority district, like the 1982 Plan, would therefore satisfy the nonretrogression requirement of Section 5.

(2) *Section 2*: The parties in the Second District litigation on liability, which included the United States, stipulated that Section 2 required the district to be majority minority. Joint Stip. No. 91. As configured in the 1982 plan, the district had a black population of 37.27%, based on the 1990 census, and was precleared by the DOJ. It contained *no* split counties. The remedial Plan increases that percentage to 39.21%. Clearly, the Plan is not retrogressive with respect to the Second District.

The Eleventh District counterpart in the Court Plan is District 4. Appellants argue it violates Section 2, because it fails to recognize and politically empower an identifiable compact, concentrated minority-population center entitled to recognition in the context of a voting district under the three part *Gingles* test. The district court found to the contrary.

Linda Meggers, the expert this Court and the district court acknowledged as the foremost authority on Georgia

[16] 28 C.F.R. § 51.54 (1990). *See also Ketchum v. Byrne*, 740 F.2d 1398, 1402 (7th Cir. 1984).

redistricting, testified as to the efforts to create a second majority minority district during the 1995 special session:

> Meggers: . . . [L]ooking at cleaning up the Eleventh . . . the way we drew it in 1991 [the first plan] I didn't think satisfied the constitutional requirements.
>
> Question: Consistent with your understanding of . . . *Miller v. Johnson* and the [VRA, was] a second majority minority district . . . possible?
>
> Meggers: Not one that said 50 percent . . . in 1990, no sir, it was not. Remedy hearing of October 30-31, 1995, Tr. 434. (hereinafter R.Tr.).

The State Defendants' counsel agreed with Ms. Meggers:

> "We very much disagree [with the DOJ and ACLU] that Section 2 mandates there be two black majority districts. . . .". Remedy Transcript (10/31/95) [hereinafter R.Tr.] 384.

The district court also agreed. ACLU J.S. App. 21-22, quoted *supra* at p. 11.

B. Adherence to Georgia's Traditional Districting Principles: The district court heard substantial testimony with respect to the traditional districting principles that governed congressional plans before the "Max-Black" era in 1992. The district court made numerous findings as to the principles that should govern the fashioning of a remedial plan. ACLU J.S. App. pp. 12-19. They include

(1) *The Integrity of Political Subdivisions*: Unless required by the overriding principle of one person-one vote, counties and cities should not be divided, unless mandated by the VRA. No such divisions, except in the Fifth District, were required.

(2) *Respect for the Traditional Cores of Districts*: The undisputed testimony established that the traditional "overriding interest" in fashioning Georgia's congressional districts was economic. Districts that underwent racial revision in 1992 via the separation of counties from their historical economic cores were restored to their geographic

and economic cores with racially divided political subdivisions reunited.[17]

(3) *Incumbents In Racially Gerrymandered Districts Are Not Due Protection*: Apellants argue that "minimal disruption" to the unconstitutional plan means unconstitutionally elected incumbents should be protected. An unconstitutionally elected incumbent deserves no protection. This Court must not permit a race-based plan to survive strict scrutiny under the guise of "incumbency protection". As stated in *Armour v. State of Ohio*, 775 F.Supp. 1044, 1061 (N.D. Ohio 1991):

> "Although courts are reluctant to provide relief on claims that a district has been gerrymandered to protect an incumbent, this rule *does not hold* when the manipulations were conducted on a race conscious basis."

See also Ketchum v. Byrne, 740 F.2d at 1406-10; and *Garza v. Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990).

The district court properly concluded that little, if any, weight should be given to the political considerations that usually protect incumbents where their districts are unconstitutional. A constitutional remedy cannot retain vestiges of its race-based origin under the guise of protecting an unconstitutionally elected incumbent.

C. The Unconstitutional Districts Were Not Entitled to Judicial Deference: Appellants incorrectly argue that judicial deference must be shown to unconstitutional districts as they represent the last "legislative" expression of intent on the matter. Appellants so contend in order to preserve as much racial gerrymandering as this Court will sanction. That approach is wrong for several reasons:

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[17] District One (1) is the Coastal District. Savannah, its traditional core, was returned to the First. The same thing can be said for Augusta/Richmond County's role in the Tenth District, Macon/Bibb County's role in the Eighth District and Columbus/Muscogee County's role in the Third District. The district court returned all these areas to their traditional districts.

(1) *The 1992 Plan was not an act which reflected the true will of the Legislature.* Both defendants Murphy and Howard testified the General Assembly acted solely to meet the demands of the DOJ and that Georgia's legislative will was completely overridden by the desire to obtain DOJ preclearance. The State has so stipulated and the district court so held.[18]

Appellants contend the State desired two majority minority districts, as evidenced by the first plan submitted in 1991. *See* DOJ J.S. at Appendix 46a. That argument ignores the evidence, including the State's admissions as to the unconstitutionality of the first plan. The State conceded all three congressional plans offered during the submission process had, as their paramount goal, the satisfaction of DOJ demands for maximizing representation of minorities. The line drawing done to achieve that illegal goal squarely conflicts with *Miller*. R.Tr. p. 277.

The testimony of Linda Meggers, the architect of all three plans, confirmed what the State now admits and what both this Court and the district court found; i.e., that the DOJ's misguided maximization agenda infected even the first plan with an unconstitutional reliance on race:

> Meggers: To be honest . . . I was partly at fault for drawing it like we did in 1991. [It was based on] my understanding of [what] I thought the Department of Justice was going to make us do . . . [At first] none of the ways I drew it ever showed a total of a 50 percent minority population . . . At the first public hearing, we were presented . . . a map . . . that . . . drew it from South DeKalb over to Augusta and then to Macon. The initial response in our office

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[18] " 'The Justice Department would accept nothing less than abject surrender to its maximization agenda. . . . [T]he General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands.' " *Johnson v. Miller*, 864 F.Supp. 1354, 1366 (S.D. Ga. 1994).

was that's ridiculous. We don't have to draw that. . . . I was the one who said if it was there we have to draw it. It was said that it doesn't make any sense and I said maybe not, but . . . we may get into trouble with the Justice Department if we don't draw it. . . . like that and I think that was the main reason they [drew it] . . . . R.Tr. 431-432.

Question: Was the portion of Bibb County that was placed in the Eleventh District . . . in the first plan the predominantly black population . . . of Macon and Bibb County?

Meggers: Yes, . . . on the third try at redrawing the congressional plan Bibb County was removed from the Eleventh District and. . . . the black population previously in the Eleventh was attached to [the] Second District.

Question: For what reason?

Meggers: That was the one way in which we could achieve a majority black VAP in the Second . . . District.

Question: So it was racially motivated?

Meggers: Yes. (R.Tr. 26).

The State's counsel acknowledged the first plan was unconstitutional:

"The overall purpose and architecture of the Eleventh that runs from DeKalb to Richmond County to Macon *in plan one was all for a racial purpose*. . . . [I]t is now a fact that the purpose of that district was borne upon a racial basis and the line drawn in that fashion for that purpose.

That in and of itself makes the Eleventh District, going out through east central Georgia . . . unconstitutional." (R.Tr. p. 320).

Plan One employed the gerrymandered DeKalb-Augusta-Macon racial triangle to make the Eleventh District meet the DOJ's now infamous 65% rule.[19] *See* App. A. Substituting a gerrymandered Macon for a gerrymandered

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[19] *See, e.g., Burton v. Sheheen*, 798 F.Supp. 1329, 1354 n.45 (D.S.C. 1992), *vacated and remanded on other grounds, SRAC v. Theodore*, —— U.S. ——, 113 S.Ct. 2954 (1993).

Macon for a gerrymandered Savannah, as the DOJ does in its Illustrative Plan, does nothing for its constitutionality. Plan One was just as racially gerrymandered as the final plan, only the demography was different. Yet, Plan One is the blueprint for every "remedy" Appellants urge on this Court.

(2) *A conscious choice to segregate the races is unconstitutional, unless mandated by the Voting Rights Act.* The Second and Eleventh Districts were held unconstitutional because of the racial division of major cities and counties. The Appellants seek to camouflage the fact their plans are still predominantly based on race by contending such districts are "less bizarre" than the adjudicated districts and represent "minimal change" of those districts.[20]

The premise that correctly guided the implementation of the court's Plan was that an unconstitutional district is not entitled to deference. The district court specifically found it could not do less than it did and still remedy the unconstitutional Districts. Appellants, on the other hand, proceed from the assumption that all "non-appendage" portions of the Districts must remain intact. This notion is but a reformulation of the "bizarreness" defense to liability; i.e., that only the most bizarre aspects of the district are unconstitutional and in need of repair. This Court has rejected this defense because race-based districting is unconstitutional regardless of the geographical configuration of the district where the plan violates traditional districting principles, and is not required by the VRA.[21]

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[20] This Court has already rejected Appellants' argument that such a claim is limited to districts with "bizarre" geographical configurations. *See Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Bizarreness is simply circumstantial evidence by which racial purpose can be proven. *Miller*, 115 S.Ct. at 2486-87.

[21] It would contravene fundamental principles of equity to allow an atmosphere of judicial deference to reanimate the unconstitutional districts in slightly less bizarre formats that perpetuate the government sponsored racial discrimination that rendered them unconstitutional initially.

The DOJ's continued efforts to impose its subjective vision of a racially "fair" congressional districting plan on Georgia is particularly troublesome in light of the history of this case. It was the DOJ that wrongly forced the State draw both unconstitutional districts. Now, the DOJ challenges the Court's remedy as too expansive, seemingly still unaccepting of the holding in *Miller v. Johnson, supra,* and its findings with respect to the magnitude of racial gerrymandering the DOJ infused into the 1992 plan.

The DOJ's demand that this Court intervene now and superimpose another DOJ "Plan" on Georgia in place of the court's Plan (when it was not even offered at the remedy hearing) would have several unacceptable effects:

(1) It would sanction *de facto* DOJ Section 5 review of an exempt court-drawn plan;

(2) It would perpetuate the micromanagement of Georgia's politics by the DOJ, which was clearly not the purpose or intent of Section 5 of the VRA, create considerable voter confusion and exacerbate the public's dismay and growing apathy over this entire matter;

(3) It would ignore the fact that Georgia accepts the court's Plan as fairly representing Georgia's traditional districting principles in a fashion that complies with the VRA *and* the Fourteenth Amendment;

(4) It would perpetuate and give credence to the continued efforts of the DOJ to conduct phantom Section 2 challenges to state districting plans via an overbroad and unconstitutional interpretation of Section 5, made all the more unacceptable in this case by the fact the Plan being challenged is court drawn;

(5) It would perpetuate and give credence to a definition of retrogression under Section 5 that demands more majority minority districts be automatically created with every census where population increases justify additional districts, regardless of whether dispersal of the minority population precluded creation of new majority minority districts without racial gerrymandering.

III. THE PLAN IS NOT INCONSISTENT WITH *UPHAM v. SEAMON*

The case of *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1981) stands for the general proposition that courts should give deference to the *last* constitutional statement of legislative intent. However, that deference is not due where the last "statement" has been judicially determined to be (1) coerced; and (2) an unconstitutional and racially discriminatory act. As stated in *Upham*, 102 S.Ct. at 1520:

> "Although a court must defer to legislative judgments on reapportionment as much as possible, it is *forbidden* to do so when the legislative plan would not meet the special standards of . . . *racial fairness* that are applicable to court-ordered plans." [Emphasis added].

Is not racial fairness a two way street? This Court held there was no community of interest to justify the connection of south DeKalb county to the string of rural east central counties that formed the "empty rural center" of this meandering district that moved via land bridge from urban Atlanta to the South Carolina border for one purpose only: race. That finding alone threw the whole district into constitutional question.

Yet, the DOJ wants the "totality" of the Eleventh Distric maintained, replacing some appendages with a more intensely racialized division of DeKalb County and a gerrymandering Bibb County (divided between three districts) to partially compensate for the loss of other gerrymandered sources of black population. The DOJ Plan ignores the breadth of this Court's condemnation of the Eleventh District and the limitations *Upham v. Seamon*, *supra*, places on the judicial deference due prior legislative plans that are racially discriminatory.[22]

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[22] Through the years, the ACLU and DOJ have argued that prior legislative plans shown to be racially discriminatory should not be given deference. It would be anomalous to contend that a racially discriminatory legislative plan cannot be given deference

A. Section Two of the VRA Did Not Obligate The Court To Retain The Majority Minority Status Of the Eleventh District

The court's Plan is borne out of a blending of two parallel lines of cases, one defining the limited powers of a court to redistrict where the legislature fails to properly accomplish the task, and the other line defining the court's broad equitable powers to fashion remedies to counteract racial discrimination.

Given the separation of powers upon which our government is based, the judiciary has traditionally sought to minimize its involvement in redistricting. However, that general rule must be tempered when race discrimination is the constitutional wrong at issue. In this case, the legislative will of a state has been subverted, and the redistricting process converted, into a tool for racial discrimination. The remedy cannot be hamstrung by the unconstitutional elements of the very plan it seeks to fix. A court should not be so tightly tethered by the traditional deference due the legislative branch that it cannot fashion a remedy affording full and complete relief where race discrimination is the evil to be remedied.

In measuring what deference might be due past legislative plans, the district court held that the racial discrimination infused into the 1992 congressional plan did not just impact two districts, but permeated the entire plan:

> "The *current districting plan* overstepped the requirements for Section 5 compliance because it was designed to secure *proportional representation* for black voters in Georgia, not adhere to the VRA." *Johnson v. Miller*, 864 F.Supp. at 1385. (Emphasis added).

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because it violated the Voting Rights Act, but a discriminatory plan that violates the Fourteenth Amendment can be given deference where the plan only discriminates against whites.

If the line drawing that caused such wholesale segregation is not cleared away "root and branch"[23], the effects of this constitutional wrong will racialize Georgia's Congressional politics indefinitely.[24]

A court possesses broad remedial powers in remedying constitutional wrongs. *See, e.g., United States v. Paradise*, 480 U.S. 149, 183-184 (1987) ("The scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). The *Paradise* court went on to note (in a non-redistricting context) that it does *not* require plans remedying racial discrimination ". . . be limited to the least restrictive means of implementation." *Id.*[25]

In *Freeman v. Pitts*, 503 U.S. 467, 112 S.Ct. 1430 (1992), this Court provided more insight into the scope of a court's equitable power to deal with unconstitutional racial discrimination, underscoring the breadth of discretion a court of equity possesses in dealing with a constitutional wrong like racial discrimination:

> "The essence of a Court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the condition or redress the injuries caused by unlawful action. . . . The task is to correct, by a balancing of the individual

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[23] *See United States v. Edgar*, 404 U.S. 1206, 92 S.Ct. 8, 9 (1971) (Justice Black stated the Fourteenth Amendment mandated that "racial discrimination . . . be eliminated root and branch.").

[24] Section 5 retrogression principles would institutionalize the racial choices made by the DOJ. To effectuate less than a full remedy creates a real potential that the gerrymandered districts will gravitate back towards racial identities that are not warranted by the presence of compact minority populations.

[25] *Accord McDaniels v. Mehfoud*, 702 F.Supp. 588 (E.D. Va. 1988). (Once a violation of VRA is noted, district court should exercise traditional equitable powers to fashion relief so it *completely* remedies prior violations and provides equal opportunity.) *See also East Jefferson Coalition v. Jefferson Pausch*, 691 F. Supp. 991 (E.D. Va. 1988).

and collective interest, the condition that offends the constitution." *Id.* at 1444.

In a variety of anti-discrimination contexts, this Court has held a court's remedial powers extend beyond elimination of the actual mechanism of discrimination when a broader remedy is necessary to remedy racial injustice. *See, e.g., Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1968). In the case of voting rights violations, Congress has squarely stated that a district court must "exercise its traditional equitable powers so that it completely remedies the prior dilution. . . ." S. Rep.No. 417, 97th Cong., 2d Sess. 31 (1982).[26] To do that, the district court restored the cores of Georgia's original districts by eliminating those boundaries that divided the population based solely on the pigments in their skin, but still retained two strong minority influence districts with the cores of the former unconstitutional districts at their foundations.

B. The ACLU's Expert Did Not Support The Contention That Section 2 Required Two Majority Minority Districts

At the evidentiary hearing on remedy, Appellants' only witness was Selwyn Carter who testified as an expert "in the field of demography and redistricting". (R.Tr. 295). He is an attorney and Director of Voting Rights Programs for the Southern Regional Council. He represented the Black Caucus in the Georgia General Assembly during the 1995 Special Session. His stated expertise is in "drafting districting plans and in assessing plans drafted by others for . . . . compliance with the Voting Rights Act." (R.Tr. 295).

Carter either prepared or supervised the preparation of every ACLU plan advocated during the remedy phase of the litigation. (R.Tr.297-298). Their principal feature

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[26] *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974), also describes the broad remedial discretion vested in a district court in cases involving racial discrimination in the drawing of district lines.

was retention of majority minority status for the unconstitutional districts. Carter was asked point blank whether he believed such a configuration of the Eleventh District was mandated by the Voting Rights Act. (*See* questions posed at R.Tr.324, 326, 330, 332). He never answered this question in the affirmative. The best he could offer was to plead uncertainty:

> *Question:* . . . [I]s there . . . a single plan [offered by] ACLU, black caucus or your organization that you can say under oath is required by the Voting Rights Act in terms of a second majority minority district?
>
> *Carter:* I believe that we are in a gray area of the law. (R.Tr. 332).[27]

Carter finally admitted the ACLU's plans were based on some subjective sense of "racial fairness":

> *Question:* . . . [Y]ou told any number of people during the Special Session that to be *politically* acceptable to the black caucus there had to be a second congressional district that was majority black?[28]
>
> *Carter:* Yes, sir.
>
> *Question:* Regardless of whether it was required by the Voting Rights Act . . .?
>
> *Carter:* I do not recall making any reference to the Voting Rights Act.
>
> *Question:* But in your own mind that was the reality?
>
> *Carter:* Yes. . . . (R. Tr. 332-3).

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[27] Carter acknowledged there were still clear cases wherein a majority minority district would be required by the Voting Rights Act (R. Tr. 333). Obviously, this was not one of them. Carter was also unable to testify regarding any community of interest that would serve as a foundation for the race based configuration of the Eleventh District advocated by Appellants. (R. Tr. 338).

[28] The ACLU alternative plans were essentially the same legislation Carter prepared for submission by the Black Caucus during the Special Session.

Question: That was based on a plea of racial fairness as opposed to any legal mandate . . .?

Carter: It was based on racial fairness . . . . (R. Tr. 330-331).

The record from the remedy hearing is similarly devoid of any analysis of voting patterns. The DOJ's "Brief on Remedy" submittted to the district court on October 27, 1995, stated that the DOJ had retained an expert to assess whether the alternative plans presented to the district court complied with the VRA. The DOJ stated, "[f]or this reason, all of the [DOJ's] observations . . . concerning [VRA] compliance are preliminary and subject to reassessment based on . . . [the experts] analysis." Brief, p. 7, n.6. No such testimony was offered leaving the DOJ without any evidentiary basis to contend that the Plan violated Seciton 2 of the VRA.

It is on this hollow evidentiary record the Appellants contend a second majority minority district was "mandated" by Section 2 of the Voting Rights Act. The argument is devoid of evidentiary substance or legal merit.

IV. THE COURT PLAN DOES NOT VIOLATE THE ONE PERSON, ONE VOTE PRINCIPLE

The court Plan achieved an overall deviation percentage below any alternative plan.[29] Yet, Appellants argue the .35% overall deviation and .11% average deviation achieved by the court Plan violated the one person, one vote principle. The argument is inconsistent with the position they took in the district court.[30]

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[29] At the remedial hearing, the DOJ declined to offer any plan. It was three weeks later when the DOJ tendered its plan. Its late submission was objected to by all other parties, except the ACLU.

[30] The inconsistency in the ACLU's position is illustrated by the fact the plan they advocated had a deviation of .93% (R. Tr. 282-283). Every alternative plan they advanced had a deviation that greatly exceeded .35. The ACLU's deviation was triple that of the court's Plan.

ACLU Appellants' counsel admitted that Georgia's policy of maintaining the integrity of political subdivisions would justify even a .9 percent overall deviation:

> "It might well be that [the] principle of maintaining the integrity of those counties articulated . . . and justified in the record would excuse the deviations of . . . .9 percent. I suppose we are suggesting that it would because we are presenting this plan as one *we think would be acceptable.*" R.Tr. 283-284. (Emphasis added).

The court Plan reduced the deviation Appellants deemed acceptable by *two-thirds* to .35 percent. The district court amply justified even that slight deviation by relying on the well established fact that Georgia's primary districting principle was maintaining the integrity of its political subdivisions.[31]

The DOJ's Illustratitve Plan has no probative value as a one person, one vote benchmark. That is because the DOJ did not respect Georgia's voting precincts in drawing its plan because precinct line information was not a part of their computer programming. Instead, the DOJ drew districts at the census block level while the court Plan went to extraordinary lengths to recognize this fundamental traditional districting principle by respecting precinct lines wherever possible.

V. THE COURT PLAN IS NOT RETROGRESSIVE

"A decree of the United States District Court is not within reach of Section 5 of the [VRA]." *Connor v. Johnson*, 402 U.S. 690, 691 (1971); *McDaniel v. Sanchez*, 452 U.S. 130, 138, 101 S.Ct. 2224 (1981). ALCU J.S. App. p. 27. In an effort to avoid application of the DOJ's regulations (28 C.F.R. § 51.54(b)), Appellants

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[31] Georgia has 159 counties, more than any State other than Texas. This demographic fact makes adherence to this traditional districting principle compatible with the State's other constitutional and statutory obligations in redistricting. ACLU J.S. App. p. 11, n.8.

argue the benchmark plan for retrogression must contain the same number of voting districts as the plan being reviewed. ACLU J.S. at p. 20; R.Tr. at 279-280. The argument ignores two self evident points. First, only a constitutional plan can serve as a retrogression benchmark. That precludes reliance on the 1992 Plan insofar as the unconstitutional districts are concerned. Second, legislative districting schemes add or lose seats with almost every new census. Just because Georgia added one congressional district does not mean its prior 1982 congressional plan cannot serve as the retrogression benchmark. Retrogression is determined by a simple measurement:

> "Retrogression may be measured by simply comparing the gross number of districts with minority population and voting majorities in the old plan and the number of such districts in the proposed plan. This was essentially the approach taken in *Beer*." *Burton v. Sheheen*, 793 F.Supp. at 1346.

In 1982, Georgia had one majority minority district, the Fifth. It was maintained in the court Plan, and its minority population was enhanced to 62%. That fact resolves any potential issue of retrogression.

The ACLU's alternative argument is that the court's Plan is retrogressive based on the 1982 Plan, because the percentage of majority minority districts decrease if just one district out of ten is preserved when an eleventh district is being added. Under this novel theory, *any* new district would have to be majority minority. If this approach was adopted, Georgia would have had to make the Eleventh District majority black regardless of the absence of a compact minority population entitled to political recognition under the VRA.

In *Burton v. Sheheen, supra*, the ACLU also argued retrogression should be measured by comparison of various alternative plans prepared by litigants and other interested parties, just as they do here. The *Burton* court squarely rejected this argument:

> "The erroneous basis for measuring retrogression urged upon the Court by certain parties . . . is to compare proffered plans one to another without reference to the existing plan. This proposed methodology is flawed in at least two respects. First, it has no basis in case law, the statutes or § 5 regulations [cites]. Second, such methodology serves as a *'racial ratchet'* which presumes that the plan offering the greatest number of black majority districts is, for that reason alone and regardless of other considerations, the benchmark against which all other plans must be measured. Such an approach enshrines the notion that the Voting Rights Act insures proportional representation by race, a proposition that flies squarely in the face of case law and statute. *See Beer, supra,* 425 U.S. at 141, 96 S.Ct. at 1363; 42 U.S.C. § 1973(b)." (Emphasis added).

The ACLU's goal oriented construction of Section 5 would create an unconstitutional statutory mandate that would require virtually *all* future districts to be majority minority districts. The tension between such an interpretation of Section 5 and the Fourteenth Amendment would render the VRA unconstitutional.[32]

VI. APPELLANTS WERE AFFORDED AN ADEQUATE HEARING ON REMEDY

Any issue of the need for a hearing as to what Section 2 required of a court plan was mooted by the court's decision to conduct an evidentiary hearing and include a full Section 2 analysis in its Order.

Appellants rely on *Edge v. Sumter County School District,* 775 F.2d 1509 (11th Cir. 1985), where the Elev-

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[32] Assuming the ACLU was correct and Georgia had to have 2 of its 11 districts majority black to avoid retrogression, the ACLU would then contend that the Twelfth District Georgia anticipates receiving in the year 2000 has to be majority black since 2 of 11 is a higher percentage (.18%) than 2 of 12 (16.6%). The argument flows like dominos through the decades of reapportionment. Every new district would necessarily have to be black under this unprecedented percentage approach to retrogression.

enth Circuit held a "district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the [VRA]." The circuit court rationalized that any proposal to remedy a Section 2 violation must itself conform with Section 2, citing *United States v. Dallas County*, 850 F.2d 1433 (11th Cir. 1988). Without citation to any other authority, the *Edge* court stated "[a] hearing must be held to permit the parties to submit evidence on Section 2 issues." *Id.* at 1510.[23] *See also Windy Roy v. County of Big Horn*, 641 F.Supp. 1002, 1023 (D.Mont. 1986). That was done in this case.

The predicate for the *Edge* holding, namely that the existing plan violated the VRA, is missing in this case. Appellants argue the opposite side of the coin; i.e., that the VRA mandated adoption of their proposed plan. A remedial hearing to insure the Section 2 violation is "remedied" would be nonsensical where the plan's demise was based on a constitutional rather than statutory defect.

The parties were given ample opportunity to argue and present evidence as to what limits the VRA placed on a judicially drawn plan. They were specifically ordered to comment on Plaintiffs' Remedy 4X plan[24] which closely tracked the remedial plan ultimately adopted. Judicial economy, and the public's need for expedited implementation of the remedial plan, dictated that such a hearing occur in the remedy phase of this litigation. Both Appellants participated fully at the hearing, and have

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[23] The Appellants also cite *Burton v. Sheheen*, *supra*, in support of their contention. *Burton* involved a case where the district court had convened a hearing to afford the parties an opportunity to be heard or otherwise comment on the alternative plans submitted, but *declined* to conduct a full Section 2 review of those plans. That fact distinguishes *Burton* from the case at bar where the district court conducted a full Section 2 analysis.

[24] Remedy 4X was a plan drawn at the Court's request under guidelines established by the Court. Plaintiffs were the only party to comply with the Court's directive to submit such a plan.

not pointed to any meaningful harm suffered by the timing of the hearing.

VII. THE ACLU HAS ABANDONED ANY APPEAL OF THE DISTRICT COURT'S ORDER ON INTERVENTION

The ACLU argues the district court erred in refusing to permit "any further intervention by private parties" with respect to the Second District (ACLU J.S. p.3). To the contrary, the ACLU participated fully in the remedy phase of the Second District litigation.[35] Moreover, the ACLU never sought to add any private citizen with standing residing in the Second District as required by *Louisiana v. Hays*, —— U.S. ——, 115 S.Ct. 2431 (1995), or to argue the issue in their submission.

These facts constitute an abandonment of this aspect of their appeal.[36] A contention not mentioned by the district court in its opinion, and not developed with any fullness before the Supreme Court on direct appeal would be considered abandoned. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 83 S.Ct. 1715 (1963).

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[35] The DOJ conceded the unconstitutionality of the Second District. The ACLU has never disagreed with that position. Perhaps that is why the ACLU elected not to devote a single sentence to the issue.

[36] Rule 18.3 at subpart 1(h) requires the Appellant set forth "a direct and concise argument amplifying the reasons relied on . . ." Appellants failed to do so.

CONCLUSION

In *Miller v. Johnson, supra,* this Court made clear the Fourteenth Amendment will not allow computer-driven consolidation of black citizens in their "own" non-compact districts as a constitutional way to enhance racial diversity within the halls of government. The Plan on appeal is a carefully drawn remedy of the rampant racial gerrymandering that impacted more than one-third of Georgia's geography. The district court capably accommodated the issue of racial fairness with Georgia's historical districting principles so to undo the DOJ's mischief and blend Georgia's districting traditions with the just demands of a multi-racial society. The worst thing that could happen now would be for this Court to sanction the DOJ's continued efforts to micromanage Georgia politics via a *de facto* Section 5 review of a court drawn remedial plan.

For these reasons, the Appellees request the Court to summarily affirm the district court and dismiss both the pending appeals.

Respectfully submitted,

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April, 1996

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APPENDIX

Client : STATE
Plan : SB2EX11
Type : Congressional

Reapportionment Services Office
Suite 407, Legislative Office Bldg

Georgia General Assembly